APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROSE M. SALAZAR, Plaintiff/Appellant, v. SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, Defendant/Appellee.	NO. 75-1842 D.C.No.C-73-0188-LHB MEMORANDUM

Appeal From the United States District Court
For The Northern District of California,
The Honorable Lloyd H. Burke,
District Judge, Presiding.
Argued and Submitted July 15, 1981

Before: NELSON and NORRIS, Circuit Judges, and REAL,* District Judge

Salazar appeals from the district court's judgment for appellee Bay Area Rapid Transit District [BART] on her claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000 et seq. On the basis

*The Honorable Manuel L. Real, United States District Judge for the Central District of California, sitting by designation.

of the record before us, we cannot say that the district court's findings of fact are clearly erroneous. We cannot disturb the district court's finding that there was no discriminatory motive, especially in light of the absence of any direct evidence that Salazar's supervisors at BART were aware that she is Mexican-American. Thus, the findings amply support the district court's conclusion that BART did not discriminate against Salazar on the basis of her national orign or on the basis of her sex.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

ROSE M. SALAZAR,	)	
	)	
Plaintiff,	)	NO. C-73-1088 LHB
	)	
v.	)	FINDINGS OF FACT
	)	AND CONCLUSIONS
SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT,	)	OF LAW
	)	
	)	
Defendant.	)	

This matter came on for trial by the Court without a jury on December 9, 1974, the trial continuing on December 10, 11, 12, 16, 17, 18, 19, 23 and 24, 1974, and the Court having heard and considered the evidence and arguments, and having the opportunity to observe the witnesses, both parties being represented by counsel and afforded full opportunity to present evidence relevant to this action, and proof being offered to the satisfaction of the Court, the Court finds the facts and states

the conclusions of law as follows:

FINDINGS OF FACT

1. Defendant, SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT ("BART"), is a governmental agency, organized and existing under the laws of the State of California, which owns and operates a rapid transit system in Alameda, Contra Costa, San Francisco and San Mateo Counties. It is undisputed that at all times relevant hereto, defendant BART was engaged in an industry affecting commerce and had in excess of 15 employees.

2. Plaintiff is a female of Mexican-American national origin. Her national origin is not apparent from her appearance or speech. During her employment, no BART management employee, including her supervisors, was aware of her national origin. No witness except one knew, before plaintiff was terminated, that she was of Mexican-American national origin. In fact,

she told her friend and fellow employee, Lizzie Payne, that she was not Mexican-American, but "white."

3. At all times relevant to this litigation, i.e., from March 1, 1971 to March 27, 1972, Dan Carson was employed by BART as Office Manager in the General Services Department.

4. In March of 1971, plaintiff was advised of a job opening at BART for a PBX Operator-Receptionist job by The Pacific Telephone and Telegraph Company, which conducted a job referral service for PBX operators. On March 4, 1971, plaintiff was interviewed by BART and hired as a BART employee at $550 per month, an amount in excess of the beginning salary for PBX operators of $450 per month and above the median of the salary range for that position.

5. Plaintiff was hired to work in the General Services Department, under the immediate supervision of Dan Carson and

under the general direction of William Benedict, Director of General Services.

6. During the one year period of her employment, plaintiff did not adequately perform the duties of the PBX Operator-Receptionist job. She refused to follow directions or take constructive comments from her supervisor and refused to follow ordinary established channels for making her complaints. She was away from her position as a switchboard operator on extended breaks in excess of 61 occasions and was absent from work a total of 185 hours, not including vacation time, which was more than twice the average absence time of employees in the General Services Department. As a result of plaintiff's poor performance, she had to be repeatedly counseled, warned and reprimanded on more than 15 occasions.

7. Plaintiff's performance was discussed with her on numerous occasions,

including meetings on June 24 and 29, September 13, 14 and 15 and October 4 and 6, 1971. At three of these meetings it was necessary to warn plaintiff of possible disciplinary action or discharge if her unacceptable performance continued.

8. Plaintiff was denied a merit increase in September of 1971, solely because of her poor performance. She was reviewed again in December of 1971, and was given the increase because she had shown a temporary improvement in her performance.

9. Beginning in January of 1972, plaintiff's performance again deteriorated. As a result, plaintiff was counseled on January 12, February 16 and 24, and March 1, 1972, regarding her performance as a BART employee,and at two of these meetings she was again warned of the possibility of discharge. Nevertheless, her poor performance continued.

10. Plaintiff applied for transfers

to the position of ACDS Foreman I in early December, 1971, and to the position of Transportation Clerk III in January, 1972. Plaintiff was not selected for the position of Foreman I because her performance record was unsatisfactory and because she was less qualified than another female employee of BART, Maria Robie, who applied for and was given the position. The position of Transportation Clerk III was given to Nancy Nixon, a female. It was not given to plaintiff because of her failure to meet the qualifications of the position, her history of poor performance and her failure to appear for an interview as scheduled by L. W. Breiner, Transportation Superintendent. At all times relevant hereto there has been a legitimate typing requirement of 50 words per minute for the position of Transportation Clerk III. Plaintiff did not consider herself a typist or capable of passing the typing test and therefore

declined to take the typing test. Nancy Nixon passed the typing test with a score of 56 words per minute.

11. Plaintiff also contends that she applied for transfers to the positions of Passenger Service Representative, Station Agent, ACDS Operator and Motor Vehicle Dispatcher between December 6, 1971, and February 29, 1972. From December 1, 1971, to April 1, 1972, there were no openings and no one was hired for the positions of Passenger Service Representative, Station Agent, ACDS Operator or Motor Vehicle Dispatcher. Moreover, with the exception of Motor Vehicle Dispatcher, these positions were already occupied or were filled after plaintiff was terminated by females, many of whom were Black and Spanish-surnamed Americans.

12. At no time during her employment at BART was plaintiff denied a transfer, promotion or salary increase or in any

other fashion disparately treated based in any part upon her sex or national origin. At all times, plaintiff was treated appropriately in view of her performance, absence record and work record.

13. On March 22, 1972, plaintiff had a telephone conversation with her supervisor, Dan Carson. At no time during this conversation was Mr. Carson asked to give, nor did he give, permission to plaintiff to be away from her position on March 23 or 24, 1972. In spite of this, on the morning of March 23, 1972, plaintiff failed to report to work as scheduled and instead attended a BART Board of Directors meeting. When plaintiff was counseled on the afternoon of March 23 for her failure to report as scheduled, she indicated that Mr. Carson had given her permission on March 22 to attend the Board of Directors meeting and had also given her permission to take the afternoon of March 24, 1972, off from work

to assist her mother in making funeral arrangements for a relative. Mr. Carson at no time granted such permission. Plaintiff was so advised and was told in the presence of Mr. C. G. Trafton that if she absented hereself on March 24, 1972, she would be terminated. On March 24, 1972, plaintiff was absent from work the entire afternoon without permission. Plaintiff was terminated based upon that absence and her prior history of poor performance, including her record of absences and her inability to get along with her supervisors and co-workers. The funeral referred to by plaintiff was held on March 20, 1972, two days before she contends she received permission from Carson to assist her mother in making these funeral arrangements.

14. After plaintiff's termination, the PBX operator position which she vacated was filled by Mrs. P. Zocchi, a female Spanish-surnamed American.

15. Plaintiff was not terminated because of her sex or national origin. She was terminated for legitimate, non-discriminatory reasons, which were not used as a pretext for sex or national origin discrimination.

16. Plaintiff initiated a grievance with respect to her termination. This grievance was processed through the fourth and final step of the available grievance procedure and was denied. At this time, there was no procedure for submitting the grievance of any employee to arbitration. Plaintiff was in no way discriminated against by defendant on the basis of her sex or national origin in the processing of her grievance.

17. Between March 27, 1972, when she was terminated from BART, and April 3, 1973, plaintiff made only six applications for employment. During this period, she did not make a serious, good faith effort

to obtain employment. On April 3, 1973, plaintiff was seriously injured in an automobile accident. Since that date she has been unable to hold gainful employment.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of this action under section 706(f)(3) of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §2000e-5(f)).

2. Defendant has not violated any rights of plaintiff under said Act and defendant is entitled to judgment that plaintiff take nothing by her complaint and defendant shall have its costs of suit herein, including such reasonable attorneys' fees as may be granted by this Court.

It is so ORDERED, and judgment will be entered in accordance herewith.

Dated: January 24, 1975.

/s/ Lloyd H. Burke
Judge of the United States District Court